Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 86-950

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WINCHESTER AND WESTERN
RAILROAD COMPANY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA and
VIRGINIA STATE CORPORATION COMMISSION,
DIVISION OF PUBLIC SERVICE TAXATION,

Appellees.

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPREME COURT
OF VIRGINIA

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ARGUMENT

Appellees, in their motion to dismiss in No. 86-950, rely on two arguments. First, they contend that the earlier decision of the Supreme Court of Virginia in this case, Winchester & Western Railroad v. Commonwealth, 226 Va. 352, 309 S.E.2d 590, Jurisdictional Statement Appendix p. 27a (1983) (hereinafter cited as Winchester & Western I), was appealable to this Court under 28 U.S.C. Section 1257. Appellees then contend that the finality they confer to Winchester & Western I for purposes of 28 U.S.C. Section 1257 precludes Appellant from now appealing to this Court after the remand of this case pursuant to Winchester & Western I,

and the subsequent appeal and opinion by the Supreme Court of Virginia in Winchester & Western Railroad v. Commonwealth, No. 860055 (Va. Sup. Ct. Sept. 5, 1986) (mem.), Jurisdictional Statement Appendix p. 27a (hereinafter cited as Winchester & Western II).

Second, Appellees contend that if a federal question was raised in Winchester & Western II, the decision was supported on adequate independent state law grounds, thus precluding review by this Court.

Appellant believes that jurisdiction under 28 U.S.C. Section 1257 is properly invoked, and that the state court decision in this case is not supported by adequate independent state grounds.

JURISDICTION WAS PROPERLY INVOKED

The most instructive case in considering when a final judgment concerning a federal issue has been rendered for purposes of 28 U.S.C. Section 1257 is Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-85 (1975). In Cox this Court identified four categories of cases in which this Court has accepted jurisdiction, notwithstanding the existence of further proceedings to come in state courts. Since Appellant was not precluded by applicable state law from obtaining consideration of the Constitutional issues in Winchester & Western II, if this case were arguably to fit into any of those four

categories, it would be the fourth category, which is:

> [T]hose situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the revelant cause of action rather than merely controlling the nature and character of, or determing the admisability of evidence in, the state court proceedings still to come.

Id. at 482-83.

This Court went on to say:

> In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 483.

Subsequently, this Court has made clear that the exception permitting review before completion of state court proceedings is a limited one, explaining:

> Consistent with the relevant jurisdictional statute, 28 U.S.C. Section 1257, the Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-77 (1975). In general, the final-judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

Flynt v. Ohio, 251 U.S. 619, 620 (1981).

The present case does not fit into the exception defined in Cox for two reasons, and must therefore meet the general finality rule stated in Flynt, supra. First, the decision in Winchester & Western I would not have been appealable to this Court because reversal of the state court on the federal issue would not have been "preclusive of any further litigation on the relevant cause of action." Cox, supra, at 482-83. No state tribunal had yet (or has yet) made a finding of fact as to the precise number of rail cars which could Constitutionally have been taxed in jurisdictions other than Virginia, thus rendering them non-taxable in Virginia. Second, a

refusal to immediately review the decision in Winchester & Western I could not have seriously eroded federal policy. This Court's early intervention in a case involving the Constitutionality of a state taxing statute does not have the immediacy of the first amendment considerations which this Court has often treated. Cox, supra; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971). Therefore, none of the requirements set forth in Cox for accepting jurisdiction in this Court before completion of the case applied to this case after the Supreme Court of Virginia rendered its decision in Winchester & Western I.

Even assuming for purposes of argument that the order and opinion of Winchester & Western I could have been appealed directly to this Court, neither the Cox decision nor any other decision of this Court holds that an appellant will be barred from taking an appeal when the case has in fact ended in accordance with the traditional notions of finality. While this "Court has, . . . in certain circumstances, treated state-court judgments as final for jurisdictional purposes although there were further proceedings in state court" Flynt v. Ohio, supra, at 620-21, it would be a great hardship on litigants if this Court were to decide that litigants whose counsel did not correctly detect those "certain circumstances" would be precluded from

appealing to this Court after "final judgments or decrees rendered by the highest court of a State" under 28 U.S.C. Section 1257 in accordance with traditional notions of finality. If the appellant in Cox had proceeded with the remand ordered by the Georgia Supreme Court, lost the case on remand, and then lost the case on subsequent appeal to the Georgia Supreme Court, would it have been denied the right to appeal to this Court? If the appellant in Organization For A Better Austin, supra, had litigated further and then appealed a permanent injunction enjoining it from passing out leaflets of any kind, would it have lost its right to appeal for failing to appeal after the issuance of the temporary injunction? Appellant believes not.

If this Court determines that Winchester & Western I was final within the meaning of 28 U.S.C. 1257, this Court will encourage numerous premature appeals if it also determines that the only final decision from which an appeal may be taken is the earliest decision which presents those "certain circumstances" recognized by this Court.

THERE WAS NO ADEQUATE INDEPENDENT BASIS IN STATE LAW FOR THE DECISION BELOW

Appellees content that there was an adequate basis in state law for the decision in Winchester & Western II. Appellant assumes Appellees mean an adequate independent basis in state

law. Even assuming incorrectly, as they do, that Winchester & Western II is a separate case from Winchester & Western I, there cannot be an adequate independent basis in state law for upholding a statute which, as applied, is repugnant to the Constitution of the United States.

Appellees argue that the Supreme Court of Virginia had the right to interpret state tax law in a fashion which rendered all 323 of Appellant's cars as taxable, and Appellant readily agrees that state courts have authority to interpret state statutes. However, Appellees have confused the issue of a state court's right to interpret state laws with the existence of an adequate independent basis in state law for the decision reached.

Since a final judgment by the highest state court has been issued, Appellant now concurs that under state law all 323 cars are considered taxable; but this matter of statutory interpretation is in no way an adequate independent basis in state law for holding that this Court has no right to review a Constitutionally impermissible taxing statute.

CONCLUSION

Appellant did not have the right to appeal this case to this Court until the rendering of the opinion in Winchester & Western II. Assuming, for purposes of argument, that Appellant had the right to appeal to this Court

following the opinion in Winchester & Western I, Appellant nevertheless again has the right to appeal to this Court after the decision in Winchester & Western II. Therefore, in any case, this appeal is properly taken.

Respectfully submitted,



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January 12, 1987

C E R T I F I C A T E

I do hereby certify that true and correct copies of the Appellant's Reply Memorandum were mailed to Mary Sue Terry, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219; Kenneth W. Thornson, Esquire, Assistant Attorney General, Supreme Court Building, Richmond Virginia 23219; Lewis S. Minter, Esquire, State Corporation Commission, P.O. Box 1197, Richmond, Virginia 23209; and William F. Schutt, Esquire, State Corporation Commission, P.O. Box 1197, Richmond, Virginia 23209, in accordance with the rules of the

Supreme Court of the United States,
this 15th day of January, 1987.

Flournoy L. Largent Jr.
Flournoy L. Largent, Jr.